

*United States Court of Appeals
for the Second Circuit*



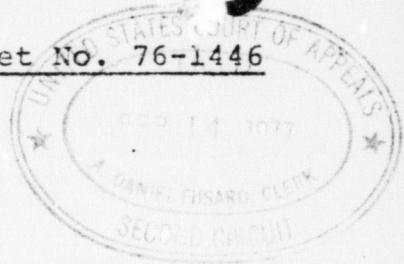
**BRIEF FOR
APPELLANT**

76-1446

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee
-against-
ROMULO G. VELLANTI,
Defendant-Appellant.

Docket No. 76-1446



BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Defendant-Appellant.

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether there are any non-frivolous issues to be raised
for this Court's review on appeal.

STATEMENT PURSUANT TO RULE 28(a) (3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Bartels, J.) rendered October 1, 1976, after a jury trial, convicting appellant Romulo G. Vellanti of three counts of income tax evasion (26 U.S.C. §7201) (Counts I-III) and three counts of filing false income tax returns (26 U.S.C. §7206(1)) (Counts IV-VI). Mr. Vellanti was sentenced pursuant to 18 U.S.C. §3651 to concurrent two-year terms of imprisonment, 30 days to be served in a jail-type institution and execution of the remainder of the sentence to be suspended. Concurrent three-year terms of probation were imposed to follow release from confinement. As a special condition of probation, payment of all tax liabilities and penalties was also required.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment*

On June 21, 1976, a superseding indictment was filed charging appellant Vellanti with six counts of violating the federal tax laws. Counts I-III charged that appellant had evaded payment of federal income tax for the calendar years 1970 (Count I), 1971 (Count II), and 1972 (Count III). Counts IV-VI charged that appellant had filed false federal income tax returns for the corresponding years 1970 (Count IV), 1971 (Count V), and 1972 (Count VI) by materially understating gross receipts for those years.

B. The Trial

1. The Government's Case

Carl Dorfman, the controller for the Hebrew Home for the Aged (the "Home") in Riverdale, New York, testified on the Government's behalf. He stated that appellant Vellanti was the plumber for the Home, explaining that appellant's responsibilities included ordinary repairs as well as substantial plumbing projects, for which appellant would furnish necessary materials, supplies, and employees (6/22/76 at 31; 6/23/76 at

*The indictment is "B" to the separate appendix to appellant's brief.

58, 75, 80-81, 87, 90, 97-98*). For such repair work and projects, appellant was paid by check (6/22/76 at 32, 40-45, 102-103). The testimony indicated that the Home had given appellant 316 checks (GX-4—GX-319**) in payment of work done there during the relevant period of time (6/22/76 at 48, 53; 6/23/76 at 58-64), and that most of these checks had been cashed at a bank in the Bronx (6/23/76 at 122-126, 128-134, 136-137). Over defense counsel's objection that summaries are not evidence (6/23/76 at 127, 132, 134), charts listing the checks, amounts, and dates on which the checks were cashed at the bank were entered in evidence (GX-324, 325, 326) (6/23/76 at 128, 132, 135).***

Ira Lewis, appellant's accountant, testified that he had prepared appellant's income tax forms. Trial counsel objected to Mr. Lewis' testimony on the ground that any communication between appellant and his accountant was privileged, precluding its disclosure. The objection was overruled (6/23/76 at 160-163). According to Lewis, every three months he was given appellant's checking account and a "slip of paper" with a sum

*Numerals in parentheses preceded by a date refer to the transcript of proceedings held on that date.

**Numerals in parentheses preceded by "GX" refer to numbers of Government Exhibits admitted in evidence.

***In addition, a similar chart listing those checks cashed at other banks or by suppliers was admitted as part of the Government's case (6/24/76 at 395, 402).

written on it. Lewis testified that appellant represented that the deposits in the account plus the additional sum noted on the slip of paper equalled the total amount of money appellant received for that quarter (6/23/76 at 170, 173-180; 6/24/76 at 283-284, 318). Further, the accountant stated that appellant verified his gross receipts, expenses, and net income for the years 1970, 1971, and 1972, all as shown by the income tax forms filed by appellant* (6/23/76 at 185, 190-191, 206, 207-208, 211, 214-222, 245-246; 6/24/76 at 297). Lewis testified that appellant never informed him that appellant was paying men "off the books" (6/23/76 at 221).

Internal Revenue Service Agent Tantillo also testified on the Government's behalf, stating that on February 21, 1976, he questioned appellant about appellant's tax liability for the years 1970, 1971, and 1972 (6/24/76 at 346). The interview occurred in the office of the lawyer who was then representing appellant. Prior to the interrogation, Agent Tantillo read appellant "his rights according to the Fifth Amendment to the Constitution" (6/24/76 at 347), stating:

... that under the Fifth Amendment to the Constitution of the United States, I cannot compel you to answer any questions, or to submit any information, if such answers

*Appellant's income tax forms were entered in evidence (GX-1-3). The forms reflected that appellant reported his gross receipts as \$20,035 for 1970; \$22,634 for 1971; and \$13,141 for 1972, while appellant reported his net income for those years as \$6,695; \$9,347; and \$6,438, respectively.

or information might tend to incriminate you in any way.

I also advise you that anything which you say and any information which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding.

(6/24/76 at 348).

Appellant objected to these warnings as inconsistent with the requirements of Miranda v. United States, 384 U.S. 436 (1966). The objection was overruled.

The agent testified that in response to questions about appellant's 1970, 1971, and 1972 tax returns, appellant stated that his signature appeared on the return; that both his gross receipts and business expenses had been overstated; and that he had paid some of his employees "off the books," a fact he had not told his accountant (6/24/76 at 353, 355, 358-359; 6/25/76 at 266-269, 274, 277).

Agent Tantillo testified that on August 12, 1975, he and another agent met with appellant and appellant's representative, an accountant named Alix Arogundi, to discuss appellant's case (6/24/76 at 361). At the meeting, appellant furnished the agents with the invoices appellant had received from the Home during the three years in question (6/24/76 at 366). These invoices reflected that approximately \$285,000 had been paid to appellant during 1970, 1971, and 1972. In addition, appellant claimed additional expenses, some of which were verified

(6/26/76 at 379), that had not been reported on the original returns (6/24/76 at 368-369). These expenses (1970, \$43,893.78; 1971, \$70,046.75; 1972, \$25,043.91) were credited to appellant for purposes of the Government's computation of appellant's net income and tax (6/24/76 at 382, 437, 440, 442-444). Over defense objections, a chart summarizing these additional expenses was entered into evidence (6/24/76 at 383).

Gerald Goldberg, an employee of the Internal Revenue Service ("IRS") testified that he computed appellant's gross receipts* for the years in question based upon the checks appellant received from the Home. Goldberg testified that appellant's gross receipts for 1970 were \$72,603 -- not \$20,035 as reported on the filed return; that his gross receipts for 1971 were \$129,912 -- not \$22,634; and that his gross receipts for 1972 were \$83,474.09 -- not \$13,141 (6/25/76 at 303-306).

Further, Goldberg testified that he computed appellant's taxable income by reducing appellant's gross receipts by the amount of money claimed by appellant as his business expenses (6/25/76 at 312). Thus, Goldberg found appellant's taxable income for 1970 to be \$15,369.22; for 1971, \$46,578.25; and for 1972, \$51,727.18.** Goldberg testified that the corres-

*Gross receipts were defined as all income received by a taxpayer required to be reported for income tax purposes (6/25/76 at 302).

**Appellant's income tax returns reflected taxable income of \$6,695; \$9,347; and \$6,438 for the years 1970, 1971, and 1972, respectively.

CERTIFICATE OF SERVICE

February 14, 1977

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

